

No. 89-188

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

COLORADO INTERSTATE GAS COMPANY, et al.,
Petitioners,
vs.

OKLAHOMA TAX COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court Of The State Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

BRYCE A. BAGGETT, Special Counsel
5801 Northwest Grand Boulevard
Suite B
Oklahoma City, Oklahoma 73118
(405) 848-5801

JOE MARK ELKOURI, General Counsel
STANLEY P. JOHNSTON, Assistant General Counsel
Oklahoma Tax Commission
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194
(405) 521-3141

Attorneys for Respondent

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THE QUESTION PRESENTED

The only question presented in this case is:

Whether Oklahoma may levy and collect a severance tax of at least 7 cents per mcf upon all gas produced from the earth of Oklahoma without offending the Commerce Clause or the Supremacy Clause of the Constitution of the United States, when such severance tax is applied to all gas produced in Oklahoma without discrimination as to whether that gas is consumed in Oklahoma or elsewhere.

THE PARTIES

Respondent acknowledges the correctness of the statement of The Parties on page ii of the Petition for Writ of Certiorari. The Oklahoma Tax Commission is exclusively designated by 68 O.S. 1981, Section 226(c) to represent the interests of the State of Oklahoma in such a case.

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**BRIEF OF RESPONDENT
IN RESPONSE TO
PETITION FOR WRIT OF CERTIORARI**

Respondent Oklahoma Tax Commission respectfully submits that a Writ of Certiorari should not be issued. The opinion of the Supreme Court of Oklahoma is correct. It affirmed the judgment of the District Court of Oklahoma County against Petitioners' claim. That judgment was entered after trial on the merits by District Judge Bryan C. Dixon who made detailed findings of fact.

Judge Dixon found as a fact that these Oklahoma severance taxes do not discriminate against interstate commerce nor violate the Supremacy Clause.

OPINIONS BELOW

1. The Journal Entry of Judgment with Findings of Fact and Conclusions of Law entered December 4, 1987 by the District Court of Oklahoma County, Oklahoma is unreported. It appears at pages 24 through 35 of the Appendix to the Petition for a Writ of Certiorari (hereafter "Petitioners' Appendix").

2. The opinion of the Supreme Court of the State of Oklahoma entered May 2, 1989 appears at pages 6 through 23 of Petitioners' Appendix. It is reported at 68 Oklahoma Bar Journal 1128 and at 774 P. 2d 468.

3. The petitioners made these same claims in CIV-78-0328-E in the United States District Court for the Western District of Oklahoma. In an unreported memorandum opinion and order dated April 28, 1980, District Judge Luther B. Eubanks dismissed that complaint because the District Court lacked subject matter jurisdiction under 28 U.S.C. § 1341.

4. The United States Court of Appeals for the Tenth Circuit affirmed that dismissal on August 5, 1981, in an opinion reported at 656 F.2d 584.

5. The Supreme Court of the United States denied a petition for certiorari in No. 81-733 on December 14, 1981, as reported at 454 U.S. 1124.

STATEMENT OF JURISDICTION

Respondent acknowledges the correctness of the Statement of Jurisdiction on page 2 of the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the petitioners' statement of the Constitutional and Statutory Provisions Involved (pages 2 and 3 of the petition) *except* for its last paragraph which incorrectly presents the two Oklahoma Statutes in this case.

The Oklahoma Conservation Excise Tax at pages 38 through 42 of the Petitioners' Appendix is not a correct printing of House Bill 1441 as enacted in 1977 *because* it includes the 1978 amendments to Sections 1108 and 1111. These 1978 amendments enabled purchasers such as these petitioners to elect to remit the conservation excise tax owed by producers and/or royalty owners.

Likewise, the Petitioners' Appendix, pages 43 and 44, presents an incorrect printing of the credit against income tax as enacted in 1977 House Bill 1439 *because* it includes the 1978 amendments enacted after the decision in *Post Oak Oil Company vs. Oklahoma Tax Commission*, 575 P.2d 964 (Okla. 1978). The Oklahoma Supreme Court in the *Post Oak* case determined that the credit was available only to producers and/or royalty owners. The 1978 amendments enabled purchasers such as these petitioners

to also claim the credit for unreimbursed severance taxes remitted by such purchasers.

The credit in 68 O.S. § 2357 D was repealed by Section 23 of 1987 House Bill 1061 which became effective on January 1, 1987. Therefore, the complaint of these petitioners as to the credit became moot after January 1, 1987.

RESPONDENT'S STATEMENT OF THE CASE

The Statement of the Case on pages 3 through 8 of the Petition distorts the pertinent facts. Throughout the eleven year history of this case, the petitioners have chosen to speak only of the Oklahoma conservation excise tax. The petitioners simply will not acknowledge that the conservation excise tax cannot be understood except when considered along with the Oklahoma gross production tax which it complements. Respondent submits the following as a more accurate statement of the case.

For more than 50 years before 1977 the State of Oklahoma relied upon its gross production tax on gas, a severance tax, for a significant portion of its revenues. In 1977 Oklahoma was confronted with serious revenue problems resulting from the erratic pricing of natural gas. In 1977 the wellhead prices of natural gas were ranging quixotically from 10 cents per mcf to \$1.45 per mcf. These aberrations in the wellhead prices of gas had no relation to the actual market value of gas.

The actual market value of gas in 1977 was at least \$1.00 per mcf. Much gas was being sold for even higher prices. Because the gross production tax was 7 percent of the price of gas at the wellhead, Oklahoma was receiving only 2.1 cents per mcf in revenue on gas being sold at the wellhead for 30 cents per mcf.

But purchasers of gas at such low prices were turning around and reselling that gas for \$1.00 or more per mcf. Oklahoma derived no revenue from such resale transactions.

In 1977 then Governor, now United States Senator, David Boren and the Legislature decided that the gas of Oklahoma should bear a severance tax of at least 7 cents per mcf regardless of the quixotic wellhead prices. After all, the removal of that gas from the earth was depleting a natural resource. That natural resource should be "replaced" by investing in the education of the children of Oklahoma and in other economic development.

The 1977 Oklahoma Legislature enacted the conservation excise tax in House Bill 1441, which became effective January 1, 1978. It is codified as 68 O.S. 1977 Supp., § 1107-§ 1111. (Petitioners' Appendix pages 38-42)

The conservation excise tax was designed to complement the existing 7 percent gross production tax. The conservation excise tax is 7 cents per mcf less 7% of the value of the gas with the proviso that the conservation excise tax shall not exceed one-third of the value of the gas. Thus, the conservation excise tax operates mathematically only upon gas which has a price greater than 17.5 cents per mcf and less than \$1.00 per mcf. The

complementary amounts of the conservation excise tax and the gross production tax are as follows:

<u>If the wellhead price of an mcf of gas is</u>	<u>The Oklahoma 7% gross production tax on that gas is</u>	<u>And the Oklahoma conservation excise tax on that gas is</u>
17.5 cents	1.225 cents	5.775 cents
20	1.4	5.6
30	2.1	4.9
40	2.8	4.2
50	3.5	3.5
60	4.2	2.8
70	4.9	2.1
80	5.6	1.4
90	6.3	0.7
\$1.00	7.0	-0-

Thus, the gross production tax and the conservation excise tax combine to impose a total severance tax of 7 cents per mcf upon gas sold for more than 17.5 cents per mcf and less than \$1.00 per mcf. If the gas has a wellhead price below 17.5 cents or above \$1.00 per mcf the conservation excise tax does not apply, but the 7 percent gross production tax does apply. (See finding of fact 16 at page 29 of Petitioners' Appendix.)

Contracts between producers and purchasers of gas ordinarily provide for the purchaser to reimburse the producer and royalty owner for new or increased severance taxes. However, some gas is sold under contracts which do not contain such tax reimbursement provisions. The 1977 Oklahoma Legislature enacted House Bill 1439 which became 68 O.S. 1977 Supp., § 2357, paragraph D, allowing a credit against income tax for unreimbursed

severance taxes paid in excess of 7.085% of value. (Petitioners' Appendix, pages 43 and 44) (The extra .085% was to take into account Oklahoma's other small excise tax on gas of .085 of 1% under 68 O.S. 1976 Supp., § 1102, which finances the Interstate Oil Compact Commission.) (See footnote 1 at page 29 of Petitioners' Appendix.)

Oklahoma's severance taxes on natural gas, including the gross production tax and the conservation excise tax, do not distinguish or discriminate between gas consumed in Oklahoma and gas consumed elsewhere. See findings of fact 17, 26, 27, 28 and 33 and conclusions of law 6, 8 and 9 at pages 30 through 34 of Petitioners' Appendix.

These petitioners do not "pay" any Oklahoma conservation excise tax whatsoever. These petitioners, as purchasers of gas, are not *liable* for the Oklahoma conservation excise tax. Rather, these petitioners *remit* conservation excise taxes for which producers and royalty owners are liable. These petitioners remit the tax either (1) because the gas purchase contracts obligated these petitioners as purchasers to reimburse those producers and royalty owners for such severance taxes, or (2) because these petitioners as purchasers have elected to remit such tax on behalf of the producers and royalty owners pursuant to 68 O.S. 1988 Supp., Section 1108 C. See findings of fact 18 through 24 at pages 30 and 31 of Petitioners' Appendix and conclusions of law 3 through 5 on pages 33 and 34 of Petitioners' Appendix.

Moreover, these petitioners have recovered all or nearly all of the tax they remitted. See finding of fact 25 at page 31 of Petitioners' Appendix.

Summarizing this statement of the case by respondent, the Oklahoma conservation excise tax enacted in 1977 complemented the 7 percent Oklahoma gross production tax on natural gas, to provide for a severance tax of at least 7 cents per mcf on all natural gas produced in Oklahoma. That severance tax on gas is levied and collected without regard to whether the natural gas is consumed in Oklahoma or elsewhere. There is no discrimination against interstate commerce or in favor of local interests.

RESPONDENT'S ARGUMENT FOR DENYING A WRIT OF CERTIORARI

This argument is in two parts. The first part is a response to the two arguments of the petitioners on pages 9 through 14 of the Petition. The second part is the respondent's counter argument.

RESPONSE TO PETITIONERS' ARGUMENTS

I

The Opinion of the Oklahoma Supreme Court Follows *Commonwealth Edison Co. vs. Montana* And Is Not Inconsistent with *Maryland vs. Louisiana*

The opinion of the Supreme Court of Oklahoma correctly applied the principles stated in *Commonwealth Edison Co. vs. Montana*, 453 U.S. 609 (1981). The Oklahoma opinion is not in conflict with *Maryland vs. Louisiana*, 451 U.S. 725 (1981).

The Louisiana tax which was scrutinized in *Maryland vs. Louisiana* was not a severance tax. Rather, it was a tax on the "first use" of gas produced from the Outer Continental Shelf federal lands and subsequently imported into Louisiana. Such a "first use" tax on gas produced outside Louisiana is in no aspect comparable to this Oklahoma severance tax imposed exclusively upon gas produced in Oklahoma. *Maryland vs. Louisiana* is inapposite to any issue in this case.

The first and primary issue in *Maryland vs. Louisiana* was the Supremacy Clause. The Supreme Court of the United States, in the first portion of its opinion, ruled that the " . . . plaintiffs are entitled to judgment on the pleadings that section 1303 C is invalid under the Supremacy Clause." 451 U.S. 751.

The opinion of this Court as to the Commerce Clause begins at 451 U.S. 752. This Court said that " . . . it is clear to us that the flow of gas from the (Outer Continental Shelf) wells, through processing plants in Louisiana, and through interstate pipelines to the ultimate consumers in over 30 States constitutes interstate commerce." 451 U.S. 754. This Court went on to state that " . . . we do not agree that the flow of gas from the wellhead to the consumer, even though 'interrupted' by certain events, is anything but a continual flow of gas in interstate commerce." 451 U.S. 755.

The Supreme Court of Oklahoma distinguished *Maryland vs. Louisiana* from the facts in this case because the Louisiana "first-use tax" was not comparable to this Oklahoma severance tax. See pages 15 and 16 of Petitioners' Appendix.

The Supreme Court of Oklahoma assiduously followed the directions of this Court in *Commonwealth Edison Co. vs. Montana*, 453 U.S. 609, in applying the four prong test of *Complete Auto Transit Inc. vs. Brady*, 430 U.S. 274 (1977). The Supreme Court of Oklahoma determined that the Oklahoma conservation excise tax satisfied that test. (pages 11-17 of Petitioners' Appendix)

The petitioners assert groundlessly that this Oklahoma severance tax, the conservation excise tax, "... is, in practical operation, identical to Texas' 'gathering tax' which was condemned in *Michigan-Wisconsin Pipeline Co., vs. Calvert*, 347 U.S. 157 (1954). (Page 12 of petition) Petitioners assert that "because of the exemptions and credits in Oklahoma, no producer or royalty owner must pay one penny of the tax. Only purchasers pay the tax."

These assertions of the petitioners simply are not true. These assertions are inconsistent with the facts found by the district court. The district court found (finding 18 on page 30 and conclusion 3 on page 33 of Petitioners' Appendix) that the liability for these Oklahoma severance taxes is imposed by the statutes upon the owners of that natural gas in the ground; i.e. the owners of the working interest and the owners of the royalty interest. In findings of fact 30 and 31 at page 32 of Petitioners' Appendix the district court found that this credit was extended to purchasers such as these petitioners by the 1978 amendments; and the district court found that there was no distinction or discrimination between interstate gas and intrastate gas in allowing the credit.

The Oklahoma conservation excise tax is not imposed upon purchasers such as these petitioners. If these petitioners have remitted any Oklahoma conservation excise tax, the trial court found that these petitioners did so " . . . either (1) because such (petitioners) had an obligation under their contracts with the owners of such working interest or royalty interest to reimburse such owners for severance taxes imposed upon such gas, or (2) because the (petitioners) have elected to remit such tax on behalf of the owners of working interest or royalty interest liable therefor under the election provided by the 1978 amendment to 68 O.S. Section 1108 C." See finding of fact 24 on page 31 of Petitioners' Appendix and conclusion of law 5 on page 33 of Petitioners' Appendix.

The Oklahoma conservation excise tax complements the Oklahoma gross production tax to levy at least 7 cents per mcf severance tax on natural gas produced and saved from the earth of Oklahoma. It is in no way comparable to the gathering tax condemned in *Michigan-Wisconsin Pipeline Co. vs. Calvert*, 347 U.S. 157 (1954).

The opinion of the Supreme Court of the State of Oklahoma in this case, does not conflict with *Maryland vs. Louisiana*, *supra*, nor with *Michigan-Wisconsin Pipeline Co. vs. Calvert*, *supra*.

On the contrary, the opinion of the Supreme Court of Oklahoma followed the directions of this Court in *Commonwealth Edison Co. vs. Montana*, *supra*, in applying the four prong test of *Complete Auto Transit vs. Brady*, *supra*.

The Supreme Court of Oklahoma applied the four prong test to the Oklahoma conservation excise tax and concluded properly that the Oklahoma conservation

excise tax did not impose a tax upon interstate commerce in violation of Commerce Clause.

II

The issues in this case do not justify a writ of certiorari.

These petitioners state that they have "passed on to consumers" most of this Oklahoma tax. (Page 13 of the Petition) That is not a reason for certiorari. 15 U.S.C. § 3320 of the Natural Gas Policy Act (page 37 of Petitioners' Appendix) expressly provides that state severance taxes on gas are part of the maximum lawful price which is to be passed on.

Taxes upon the severance of gas are levied upon the producer, but are ultimately recovered by the producer as a part of his cost. 15 U.S.C. § 3320 provides for that recovery of severance tax cost as part of the price of gas. The fact that this tax is recovered as part of the price of gas is irrelevant to any constitutional issues.

The petitioners seize upon the expressions of a few Oklahoma legislators as evidencing an intent to discriminate against interstate commerce in the enactment of the Oklahoma conservation excise tax. Such an intent, if it existed at all, was entirely subjective. No such intent is expressed in the statute.

This Court should not consider legislators' press statements in determining legislative intent. Legislative intent should, in the first instance, be derived from the statute itself. If the legislative intent is clear and unambiguous from the statute then jurists should deem it

unnecessary, if not improper, to go outside the statute to consider extraneous materials.

Clear and unambiguous statutes enacted by State legislatures or by Congress should be construed to mean what they say without courts resorting to press statements or committee reports. Press statements are notoriously political and polemic, often not forthright in all pertinent facts. Committee reports are usually written by unelected and faceless members of the staffs of legislative and congressional committees rather than by the representatives and senators who actually voted for the legislation which became the statute. Quite often bills are considered and enacted without the members having ever read or heard those press statements or those committee reports. It is a disservice to the majorities of Congress and to the majorities of State legislatures to attribute to them the thoughts and ideas expressed in the press statements or committee reports issued by others.

These petitioners, infected by the myopic view of William Talley, attribute malevolent intent to the Oklahoma Governor and Legislature where in fact none existed. The ultimate legislative enactment was an even-handed, nondiscriminatory severance tax.

The trial judge, after several days of receiving testimony and documentary evidence, found as a fact that the Oklahoma conservation excise tax did not discriminate between gas consumed in Oklahoma and gas consumed elsewhere.

The trial court found that some intrastate gas sold for less than \$1.00 per mcf and, therefore, bore the conservation excise tax, while some interstate gas sold for more

than \$1.00 per mcf and, therefore, did not bear the conservation excise tax. Finding of fact 17 at page 30 of Petitioners' Appendix. The trial court also found that the conservation excise tax does not distinguish or discriminate between natural gas consumed in Oklahoma and natural gas consumed elsewhere. See findings of fact 26, 27 and 28 at pages 31 and 32 of Petitioners' Appendix. The trial court found that there was no legislative intent to discriminate against interstate commerce. See finding of fact 33 at page 32 and conclusion of law 8 at page 38 of Petitioners' Appendix.

Inasmuch as the trial court found that this Oklahoma conservation excise tax does not discriminate against gas in interstate commerce in favor of gas consumed in Oklahoma, there is no substantial or important question in this case to justify the granting of a writ of certiorari.

III

Respondent's Counter Argument

This case is now more than eleven years old. It began when these same petitioners filed a complaint in the United States District Court for the Western District of Oklahoma on April 13, 1978. That District Court dismissed the complaint on April 28, 1980, for want of jurisdiction under 28 U.S.C. § 1341. That judgment was affirmed by the United States Court of Appeals for the Tenth Circuit on August 5, 1981. This Court declined to issue certiorari in No. 81-733 on December 14, 1981, 454 U.S. 1124.

Thereafter, the petitioners filed this action in the District Court of Oklahoma County, Oklahoma on January 8, 1982. This case was tried before District Judge Bryan C. Dixon, sitting without a jury, who entered judgment on December 4, 1987. The Supreme Court of Oklahoma entered its opinion on May 2, 1989.

This conservation excise tax was levied and has been collected since January 1, 1978. As stated by the petitioners the State of Oklahoma has received approximately \$130 million in revenues from this tax. Oklahoma has spent these revenues primarily to educate the children of Oklahoma. The budget of Oklahoma would be devastated if, eleven years after this tax became effective and its revenues were collected and spent, this Court should now declare that tax invalid and require Oklahoma to refund \$130 million.

These petitioners are not out the amount of this tax. On the contrary, these petitioners have been reimbursed for this tax by subsequent purchasers of the gas. See finding of fact 25 at page 31 of Petitioners' Appendix.

This case does not present any issues which constitute "special and important reasons" for granting a writ of certiorari as provided in Rule 17.1. On the contrary, the issues are the same issues which this court has already fully adjudicated in *Commonwealth Edison Co. vs. Montana*, supra.

The credit which was formerly in 68 O.S. 1977 Supp., § 2357 D, was repealed by § 23 of 1987 House Bill 1061 as of January 1, 1987. It is no longer an issue. Thus, this claim became moot after January 1, 1987.

The 1977 Oklahoma Legislature enacted a valid severance tax in House Bill 1441. The petition for a writ of certiorari should be denied.

CONCLUSION

Upon the complete facts as set forth in the Respondent's Statement of the Case, there are no special or important reasons for review and, therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BRYCE A. BAGGETT,
Special Counsel
5801 N.W. Grand Blvd. - Suite B
Oklahoma City, Oklahoma 73118
(405) 848-5801

JOE MARK ELKOURI,
General Counsel
STANLEY P. JOHNSTON,
Assistant General Counsel
Oklahoma Tax Commission
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194
(405) 521-3141

Attorneys for Respondent

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